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No. 288

In the Supreme Court of the United States

OCTOBER TERM, 1964

ALHAMBRA TRUCKING CO., and T. T. CONNOLLY, et al., doing business as IPCO TRANSPORTATION COMPANY,

Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Brief for Appellee in Opposition

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OPINIONS BELOW

The Supreme Court of California denied petitions for writ of review without opinion. The decisions and orders of the California Public Utilities Commission (App. A. of Petition) are reported in 60 Cal. P.U.C. 537 and in 60 Cal. P.U.C. 544.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California (Commission) respectfully submits that, more appropriately stated than in the petition herein, the questions presented are:

1. Is the term "by any other device" contained in Section 3668[1] of the Public Utilities Code of the State of California so vague and uncertain that appellants were denied due process of law, in violation of the Fourteenth Amendment, by the Commission's decisions and orders finding that the contrivances employed by each of the appellants constituted a "device" in violation of that section?

2. Does the denial by the highest court of the State of California of appellants' petitions for writ of review of the decisions of the Commission, without having the record certified to it, without oral argument and without opinion, violate the due process clause of the Fourteenth Amendment?

STATUTES INVOLVED

The pertinent provisions of the Public Utilities Code of the State of California (Sections 3668, 3774, 1756-1757 and 1759-1760) are set out in full in the Petition herein (pp. 28a to 31a of Petition).

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1. Section 3668 of the Public Utilities Code reads as follows: "No highway permit carrier, or any officer, or agent thereof, or any person acting or employed by it, shall, by means of known false billing, classification, weight, weighing or report of weight, or *by any other device*, assist, suffer, or permit any corporation or person to obtain transportation for any property between points within this State at rates less than the minimum rates or more than the maximum rates then established or approved by the commission." (Emphasis added.)

STATEMENT

An explanation of some of the terms used hereinafter is offered to the Court. A "prime" or "overlying" carrier is the one to whom the shipper primarily looks for performance of the contract of transportation. The prime carrier may subcontract the actual hauling to a "subhauler" or "underlying" carrier. The prime carrier must charge and collect from the shipper not less than minimum rates. He may, in turn, pay the subhauler an amount which they agree upon. However, when, as in this case, the shipper and the prime carrier are affiliated, the difference between the minimum rate collected by the prime carrier from the shipper and the amount subsequently paid by the prime carrier to the subhauler inures to the benefit of the shipper or its stockholders. Because of the affiliated relationship, the shipper is, as in this case, able to obtain transportation of its property at less than applicable minimum rates.

Appellants' statement (Petition, pp. 5-12) is factually correct with the exception of the following errors or omissions:

1. The minimum rates established by the Commission (Minimum Rate Tariff No. 2) are not applicable to transportation performed for prime carriers by other "independent-contractor subhaulers," as long as the "independent-contractor subhaulers" are not utilized to obtain transportation for a shipper at less than the applicable minimum rates. However, if there exists such a unity of ownership, interest and control between the shipper and the alleged prime carrier that it can be said that the latter is only an ostensible prime carrier, and that the carrier which actually performs the transportation involved for the shipper-carrier combination is not an "independent-contractor subhauler" but is *in fact* the prime carrier, it is unlawful for

such carrier to charge or collect from the shipper or the ostensible prime carrier any lesser rate than the minimum rate established by the Commission. E.g., pages 1, 2 and 8 of the Appellee's Answer to the Petition for Writ of Review in California Supreme Court.

2. As to Alhambra, the degree of common ownership between the carrier and shipper entities is seventy-nine percent. Two of the three directors of Alhambra's Board of Directors are members of the shipper's six-member Board of Directors. A complete and detailed statement of all of the other facts is contained in the Commission's decisions attached to the Petition herein (pp. 3a to 28a).

3. Section 3774 of the Public Utilities Code of the State of California authorizes the Commission to cancel, revoke or suspend the operating permits of a carrier for any illegally conducted highway operations. The Commission *suspended* appellants' operating permits or, in the alternative, imposed a $2,000 fine. This does not amount to a "forfeiture" as alleged by appellants at pages 7 and 10 of the Petition herein.

4. The word "device" as utilized in Section 3668 of the Public Utilities Code of the State of California is preceded by the words "by any other", and not by the more restrictive word "similar" as indicated on page 7 of appellants' Petition herein.

ARGUMENT

The Commission is a constitutionally created agency, and has been given broad powers to prescribe and enforce minimum rates for the transportation of property upon the highways of the State of California. (Article XII, Sec. 22 of the California Constitution.) The Legislature of this State provided in Section 3668 of the Public Utilities Code that all "devices" permitting or allowing persons or corpo-

rations to obtain transportation of their property at less than the minimum rates shall be condemned. The phrase "by any other device" is a reservoir to encompass all schemes and contrivances which may be invented to permit or allow a person or corporation to obtain transportation of property at less than the minimum rates. Section 3668 forecloses all inventions in the field of evasion of minimum rates.

I. There Has Been No Denial of Substantive Due Process.

At the outset, the Commission takes exception to appellants' assertion that Section 3668 is so vague and indefinite that reasonable men may differ as to its meaning. It is respectfully submitted that the manifest purpose of this section is to strike through all forms of discrimination in rates between shippers and to maintain stability in the minimum rate structure. In *Union Pacific Railroad Co. v. United States*, 313 U.S. 450 (1941) construing a similar provision of the Elkins Act, the Court stated at pages 461-462:

> "With the adoption of prohibition against open rate cutting, various devices were resorted to. . . . Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention. *Any and all* means to accomplish the prohibited end are banned. . . . In fact favoritism which destroys equality between shippers, however brought about, is not tolerated."[2] (Emphasis added.)

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2. Two sections of the Interstate Commerce Act which contain similar language to that which is contained in Section 3668 of the Public Utilities Code of the State of California read in part as follows:

> 49 U.S.C. Section 6(7). "Transportation without filing and publishing rates forbidden; rebates; privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and

The words of Justice White, speaking of the Elkins Act, in *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361, 392 (1906) are appropriate:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination to this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation

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published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or *by any device* any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." (Emphasis added.)

49 U.S.C. Section 10(2). "False billing or classification by carrier; penalty. Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or *by any other device* or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense." (Emphasis added.)

which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."[3]

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3. In *Southern Railway Co. v. United States and Interstate Commerce Commission*, 186 F. Supp. 29, 36 (N.D. Ala. 1960), aff'd 294 F.2d 850, the court said:

"These statutes, remedial in nature, are 'applicable to every method of dealing by a carrier by which the forbidden result could be brought about.' " Citing *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906).

The court stated in *United States v. Union Pacific Railroad Co.*, 173 F. Supp. 397, 412 (S.D. Iowa 1959), aff'd 362 U.S. 327:

"The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil." (citing cases)

In *United States v. Drum*, 368 U.S. 370, 374, 376 (1962) this Court stated that:

"[T]he primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. . . ."

"[T]he problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability of a narrow fact situation. . . ."

See also *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) and *United States v. Metropolitan Lumber Co.*, 254 F. 335 (D.C.N.J. 1918).

Section 3668 is likewise a highly remedial statute, and as stated by Justice White, in the *New York* case, 200 U.S. 361, *supra*, "is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve," that being to strike through all pretense, all ingenious devices, to evade the minimum rate structure. (See also, *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (C.C.E.D. Wis. 1905.) When Section 3668 is read in the light of the legislative purpose for which it was enacted, its meaning is clear and precise. It is submitted that the Commission should not be harnessed with a strict "administrative test" to determine whether, in exercising its broad regulatory powers, a certain arrangement or contrivance constitutes a "device" in violation of Section 3668. Each case must rest on its own facts. The Commission must look to the substance and the results and not be blinded by mere forms of law. (*Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic & Commerce Association*, 247 U.S. 490 (1918). It is respectfully submitted that the Legislature could not have foreseen all of the ingenious schemes which could be invented to evade the minimum rate structure, and for this reason the Commission should and does have wide latitude in determining whether any given set of circumstances constitutes a "device". In *United States v. Milwaukee Refrigerator Transit Co.*, 145 F. 1007 (C.C.E.D. Wis. 1906), construing a similar provision of the Interstate Commerce Act, the court stated at pages 1012 and 1013:

> "It matters not that the particular practice herein disclosed is not described in the act. The inhibition of 'any device whatever' that accomplishes the condemned results is a ban upon invention in this field."

The administrative test, to the extent that one can say that there is a test, employed by the Commission, is whether the results of the contrivance bring about the forbidden end, i.e. whether the shipper has obtained transportation of its property at less than the prescribed minimum rates. If a shipper has acquired an unfair economic advantage by the utilization of an ingenious contrivance or device over other shippers similarly situated, the Commission has consistently held that such a contrivance violates Section 3668.[4] It is submitted that by reading Section 3668 in the light of the obvious legislative intent, reasonable men could not differ as to the meaning of this section and of the word "device" contained therein.

The Commission correctly found upon the undisputed facts (see IPCO Pet. for Writ of Review and Alhambra Pet. for Writ of Review in the California Supreme Court) and after considering the ultimate result of the combination thereof, that "there exists such a unity of ownership, interest and control" between the shipper and the alleged prime carrier as to make such an intercorporate arrangement a "device" in violation of Section 3668.[5]

The intent of Section 3668 of the Public Utilities Code is plain and precise, and that which is condemned therein can be reasonably inferred therefrom. The statute is not so vague and indefinite that reasonable men may differ as to its meaning, but rather the statute condemns a result.

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4. *J & V Trucking Co.*, Case No. 6567 (Dec. No. 63227) 59 Cal. P.U.C. 337; *Direct Delivery System*, Application No. 35927 (Dec. No. 51619) 54 Cal. P.U.C. 258; *Trinity Trucking & Lumber Co.*, Case No. 5893 (Dec. No. 55476) 57 Cal. P.U.C. 698; *Soule Transportation, Inc.*, Case No. 7105 (Dec. No. 63103) 59 Cal. P.U.C. 260; Pet. for writ of Review den., S. Ct. No. S.F. 21024. *Southern California Lumber Transport*, Case No. 6016 (Dec. No. 57341) 56 Cal. P.U.C. 553 (Certiorari den., S.F. No. 20076).

5. See pages 9a and 23a of Petition herein.

and any arrangement, contrivance or device which is invented to achieve the forbidden result is condemned. Such a statute does not collide with the due process clause of the Fourteenth Amendment. Thus, there is no federal question requiring settlement by this Court.

II. There Has Been No Denial of Procedural Due Process.

At the outset the Commission takes exception with appellants' assertion that the Commission's procedures do not provide for an alleged "minimal safeguard of preliminary findings by an impartial hearing examiner." (Pet., p. 19.) The Rules of Procedure of the Commission make provision for the filing of a petition for a proposed examiner's report (Rules 69-71). However, appellants failed to avail themselves of this procedure.

The Legislature of the State of California has made provision in Section 1756 for judicial review of Commission decisions. This section provides that a complaining party may "apply" to the Supreme Court for a writ of review,[6] and that if the writ is issued, the record shall be certified to it. The Commission respectfully submits that an aggrieved party has the *opportunity* for judicial review of Commission decisions under the existing appellate procedures of this State. The petition for writ of review and the answer thereto put the court in full and complete possession of all the facts.[7] In the cases herein involved, the Supreme

6. The writ of certiorari may be labeled a writ of review (California Code of Civil Procedure § 1067).

7. Wheat, Practice and Procedure before the Railroad Commission, 15 Cal. L.Rev. 445, 477, 480, (1927).

> "That court considers the petition and any answer thereto which the Commission may file, and either grants or denies such writ. . . ."
>
> . . . . . .
>
> "Thus the essential issues are raised and brought squarely

Court denied appellants' petitions without opinion. (See pp. 1a, 15a of Petition herein.)

The question of the constitutionality of this procedure was before this Court in the case of *Napa Valley Electric Co. v. Railroad Commission of the State of California*; 251 U.S. 366 (1920). It is stated at page 372:

> "[T]he applications for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California. . . . And further, to quote the district court, 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact'. (Citing cases.) . . . The court held, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company."[8]

The lower court in the same case held that:

> "Nor is it material that the reasons for the conclusion reached by the court are not given. We are not concerned with the reasoning, but only with the judgment, and it must be assumed in support of the latter that upon the facts presented to it the state court upon due consideration reached the conclusion that plaintiff's rights had not been violated." (*Napa Valley Elec-*

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to the attention of the court within ten days after the initiation of the proceeding before that tribunal. Since the denial of a writ of review has been held to be a final determination upon the matters involved (*Napa Valley* case) this would seem to be the quickest possible method of obtaining a final judicial decision upon a disputed point of law."

8. To the same effect, see *Southern Pacific Co. v. Van Hooscar*, 72 F. 2d 903 (9th Cir. 1934).

tric Co. v. Railroad Commission of California, 257 F. 197 (N.D. Cal. 1919), aff'd 251 U.S. 366 (1920).

In *Lehigh Valley Railroad Co. v. Board of Public Utility Commissioners*, 278 U.S. 24 (1928), this Court expressly rejected the "Ben Avon"[9] doctrine under the circumstances therein involved. It is submitted that the "Ben Avon" doctrine has no application to the cases here under review.[10]

Appellants would have the California Supreme Court examine the record and reweigh the evidence in every matter that may come before that court on a petition for writ of review. It is respectfully submitted that this would place an undue burden on that court.

> "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." *Gray v. Powell*, 314 U.S. 402 (1941).

Denial of a petition for a writ of review, the granting of which is discretionary with the court, does not infringe upon the constitutional rights of the appellants for judicial review. (*Lehigh Valley R.R. Co. v. Public Utility Commissioners*, 278 U.S. 24 (1928), affirming *Napa Valley* case, *supra*.

The California Supreme Court has consistently followed the *Napa Valley* case, *supra*, and recognizes that a complaining utility has a right to a review and determination of whether the Commission regularly pursued its authority and whether the order or decision violates any right of the petitioner. In passing on these questions, the court must

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9. *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920).

10. See also McGarney, Administrative Decision and Court Review thereof, in California, 29 Cal. L. Rev. 110 pp. 135-144 (1940).

pass on the merits thereof as of law and fact. As is stated in *Southern California Edison v. Railroad Commission of the State of California*, 6 Cal. 2d 737, 747, 756, 59 P.2d 808 (1936),

> "In thus disposing of them the court acted judicially and the determination thereof was on the merits even though the order of the court be a denial of an application for review. Such an order of this court fully complies with federal constitutional requirements as interpreted by the Supreme Court of the United States. . . . The denial of the petition for a writ of review in each case must be deemed a determination of the point against petitioner's contention." (Citing *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920)).
>
> See also *People v. Western Airlines, Inc.*, 42 C.2d 621 (1954).

In *Consolidated Freightways, Inc. v. Railroad Commission of California*, 36 F. Supp. 269 (N.D. Cal. 1941), the court stated that:

> "The law in California is that the State Supreme Court, in reviewing an order of the Railroad Commission, acts solely in a judicial capacity. [Citing cases.] Thus, a judicial decision was rendered . . . ."
>
> See also *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930)

It is submitted that the cases of *Ben Avon*,[11] *St. Joseph Stock Yards*,[12] and *Crowell v. Benson*,[13] can be distinguished from the proceedings here under review. In these cases,

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11. *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920), *supra*.

12. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, (1936).

13. *Crowell v. Benson*, 285 U.S. 22 (1932).

the administrative agency was performing the legislative function of rate making, and the constitutional question was whether there was confiscation. This distinction is recognized by this Court in the *St. Joseph Stock Yard* case, *supra*, at page 52:

> "This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged."

Mr. Justice Brandeis' concurring opinion in the *St. Joseph* case, *supra*, is most enlightening. In reviewing the cases he states that,

> "[D]ue process does not require that a decision made by an appropriate tribunal shall be reviewable by another. [Citing cases] They tell us that due process is not necessarily judicial process."[14]

Appellants make no contention that due process was denied them in that they failed to have notice of hearing, a fair and impartial hearing, or opportunity to present evidence. Their sole contention is that they were denied judicial review in violation of the due process clause of the Fourteenth Amendment. Appellants had the opportunity for judicial review (Section 1756 of the Public Utilities Code), they exercised this opportunity, and the Supreme Court, after considering the petition for writ of review and the answer thereto, denied the petition. The denial of the petition for writ of review constituted a judicial judgment by the highest court of the State of California. Thus, the Appellants were not denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. Therefore, there is no federal question requiring settlement by this Court.

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14. *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 77, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for an appeal (or petition for writ of certiorari) should be denied.

Respectfully submitted,

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